Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

IN THE MATTER OF JOEL GREENBERG, AN ATTORNEY AT LAW

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. IS THE NEW JERSEY SUPREME COURT, ACTING AS THE STATE LICENSING AND REGULATORY BODY FOR THE PRACTICE OF LAW, REQUIRED TO COMPLY WITH THE AMERICANS WITH DISABILITIES ACT (42 U.S.C. § 12131, et seq.)?

2. IS THE NEW JERSEY SUPREME COURT, PURSUANT TO THE AMERICANS WITH DISABILITIES ACT (42 U.S.C. § 12131 et seq.), REQUIRED TO CONSIDER AND GRANT REASONABLE ACCOMMOD-ATIONS, LESS THAN PERMANENT DISBARMENT, WHEN DISCIPLINING A LICENSEE, FOR ACTS COMMITTED OVER FIVE YEARS AGO, AS AN UNDISPUTED RESULT OF A TEMPORARY MENTAL DISABILITY FROM WHICH THE LICENSEE HAS RECOVERED?

LIST OF PARTIES

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OPINION BELOW

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

The opinion of the highest state court to review the merits of In the Matter of Joel Greenberg, An Attorney at Law, is reported at 155 N.J. 138 (1998), and appears at Appendix A to the petition hereto.

JURISDICTION

On July 17, 1998, the New Jersey Supreme Court decided Petitioner's Case. A copy of that decision appears at Appendix A.

On October 14, 1998, an extension of time to file this petition for a writ of certiorari was granted under Application No. A-287. The filing date was extended to November 23, 1998.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Subject to the provisions of this title, no qualified individual with a disability shall by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity or be subjected to discrimination by any such entity. 42 U.S.C. § 12132, et seq.

STATEMENT OF THE CASE

In September of 1993, the Petitioner voluntarily came forward and advised his wife, partners, family, the Office of Attorney Ethics ("OAE"), and the Atlantic County Prosecutor's Office that he had done things harmful to himself and to his family, including the unauthorized taking of partnership funds from his law firm. On his own initiative, he asked the OAE if he could place his license in suspension because he did not specifically know what he had done or what he was capable of doing. He took this action to protect his firm and clients, and because he felt that he was out of control. Because his actions were controlled by his subconscious, the Petitioner had little recollection of the amount of funds taken or the method(s) used. To prevent any additional self-destructive acts, the Petitioner immediately sought and received psychiatric intervention for over two years.

All three board certified psychiatrists who testified at Petitioner's hearing, including the OAE's expert, concluded that he had been suffering from severe depression for many years.

Untreated, his mental illness developed into episodes of self-destructive behavior. All three psychiatrists also agreed that the Petitioner lacked a conscious awareness of his conduct. (Appendix B-D, outline of experts testimony.) The Petitioner is one of three siblings, each one of whom have suffered from different forms of Depression.

Within a few months, the legal community and the public learned of Petitioner's problems. The legal community of Atlantic County, the South Jersey Civil Trial Bar, the Judiciary, former clients, partners, and the public stood by the Petitioner, encouraging his recovery and wholeheartedly supporting his efforts of reinstatement. In fact, in an unprecedented action, the Atlantic County Bar Association passed an unanimous resolution supporting the petitioner's return to the practice of law. The New Jersey State Bar Association filed an amicus curiae brief in support of the Petitioner.

Charges were not filed by any client nor brought by the Prosecutor's Office. Within weeks of his initial report to his partners, Petitioner paid in full the amount determined by the firm's audit. His partners stood by him and would welcome him back to the firm.

The OAE filed charges against the Petitioner in January of 1995. The Petitioner argued that his unethical conduct was the result of his mental illness. Testimony was presented from a half a dozen lay witnesses who detailed their observations of the Petitioner during 1991 and 1992. In summary, they testified that the Petitioner, at times, appeared lethargic, confused, and forgetful, occasionally forgetting where he was going and where he had been. He was confrontational at home, asking his wife for a divorce and blaming his children for things they never could have done. Dr. Sadoff, the OAE's expert, agreed with respondent's experts that the Petitioner tended to repress, suppress, or blot out memories of angry behavior or words and that he was not aware of his self-destructive illness. All three experts, including Dr. Sadoff, testified that the Petitioner's illness was the sole cause of his conduct.

Due to the status of the disciplinary law in New Jersey, four members of the Disciplinary Review Board voted for disbarment. Three members dissented and voted for a suspension. One member did not participate. Another member recused herself because she had joined approximately 115 other attorneys, 25 community and religious leaders, as well as former clients, submitting letters in support of the Petitioner.

On September 23, 1997, this matter was orally argued before the New Jersey Supreme Court. During oral argument, counsel and the court discussed a number of issues, including mental illness and how this disability relates to discipline. It was suggested by counsel that, since disbarment in New Jersey is permanent, proctorship or other accommodation would ensure that the public was protected and would permit a new, healthy attorney to resume his legal career in five years. This approach would satisfy New Jersey's goal of protecting the public and the integrity of the profession while not punishing a disabled attorney for the rest of his life. In fact, one of the reasons for the enactment of the Americans With Disabilities Act is to protect rehabilitated

individuals. Mental illness and other related topics were discussed and or briefed by Petitioner for presentation to the New Jersey Supreme Court.

On July 17, 1988, ten months after oral argument, a divided Court (5-2) issued an Order for disbarment., a permanent act in the state of New Jersey. A well thought out dissent was filed, arguing for the Petitioner's reinstatement because of the undisputed connection between his mental illness and conduct.

The New Jersey Supreme Court found, by undisputed medical evidence, that the Petitioner's conduct was the result of his mental illness. However, they found that he was not McNaughten "insane" at the time of his conduct. The Court further found that the severity and magnitude of the mental illness is irrelevant so long as the attorney understood at some level that what he or she was doing was wrong. In the Matter of Joel Greenberg, An Attorney At Law, 155 N.J. 138, 151 (1998). Unless the attorney was out of touch with reality or unable to appreciate the ethical quality of his conduct, disbarment is mandatory. Id. at 156. The test for mental illness used by the New Jersey Supreme Court as a licensing body, contradicts the definition of mental illness used in the Federal Statute. The American With Disabilities Act demands that state entities such as the New Jersey Supreme Court, follows its mandate. The New Jersey Supreme Court acknowledges the Petitioner's illness was severe yet it still ordered a lifelong punishment. Id. at 158-9. In fact, the Court notes: "To permanently disbar him now may appear unjust." Id.. at 160. Not only is it unjust, it is in violation of Federal Law.

The Supreme Court concluded, illogically, that:

> We do not sanction Greenberg because he suffers from a mental illness. Greenberg betrayed a sacred trust - he stole money from his partners. The message which this case sands to the bar is not that attorneys in need of assistance should continue to practice without seeking help but, rather, that such attorneys should seek help as soon as possible and certainly if they are about to engage in activities that will irreparably damage

> their professional reputation and the public's confidence in the integrity of the Bar.

Id. at 161. An individual suffering from a severe mental illness, on a self-destructive path, does not ask for help before he begins to self-destruct. If the New Jersey Supreme Court's logic was a reality, there would be very few mentally ill individuals, few psychiatric hospitals, and almost no suicide. Everyone would seek help before they acted in a self-destructive manner. Conclusions based on rational behavior when dealing with an ill mind is an exercise in futility. The strained logic of this conclusion is an attempt to avoid the mandate of the Americans With Disabilities Act.

The dissent expresses the spirit, if not the mandate, of the Americans With Disabilities Act, when it states:

> The Court declines to consider as evidence mitigating against disbarment the indisputable record proof that respondent's misconduct was the direct result of a major depressive disorder exacerbated by a series of personal setbacks and a genetic predisposition to depression.

Id. at 184. Justice Stern concludes that: [m]oreover, this record is unique because of the undisputed connection between respondent's mental illness and his misconduct. Id. at 189.

The Supreme Court of New Jersey can and should discipline egregious conduct even if it is the result of a mental illness. However, to order permanent disbarment to a now healthy attorney for conduct that was committed five years earlier as a result of a mental illness, is a violation of the Federal Law. Therefore, the permanent disbarment based on the finding by the New Jersey Supreme Court is in violation of the Americans With Disabilities Act.

REASONS FOR GRANTING THE PETITION

The New Jersey Supreme Court, as a State Licensing Agency, should not be permitted to avoid the mandates of Federal Legislation when disciplining attorneys. The United State Supreme Court must let all other state agencies and employers know that the Americans With Disabilities Act is important Legislation that must be followed by all. The Americans With Disabilities Act, 42 U.S.C. § 12132, became effective July, 1992. Since that time, all state agencies are required to comply with the Americans With Disabilities Act in hiring and disciplining their employees.

A state agency's right to license and discipline its members must be done within the guidelines of the Americans With Disabilities Act. Judice v. Hospital Serv. Dist. No. 1, 919 F. Supp. 978 (E.D. La. 1997); Stillwell v. Kansas City, Mo. Bd. of Police Com'rs, 872 F. Supp. 682 (W.D. Mo. 1995). The mental illness that the Petitioner suffered from is protected by the Americans With Disabilities Act, according a New Jersey United States District Court. Olson v. General Electric Astrospace, 966 F. Supp. 312 (D.N.J. 1997). Interestingly, the District Court even found that depression is protected under the New Jersey Law Against Discrimination (N.J.S.A. § 10:5-5). A number of other Federal Courts have defined depressions as a mental illness within the purview of the Americans With Disability Act. See Prichard v. Southern Co. Svcs., 92 F.3d 1130 (11th Cir. 1996), modified, reh'g denied, 102 F.3d 1118 (11th Cir. 1996); cert. denied, 520 U.S. 1274 (1997); Mendez v. Gearan, 956 F. Supp. 1520 (N.D. Cal. 1997); Fitzgerald v. Allegheny Corp., 904 F. Supp. 223 (S.D.N.Y. 1995).

The Petitioner is now mentally healthy. According to a New Jersey District Court, "[t]he ADA thus protects those individuals who have recovered from a disability . . . ." The Medical Soc'y of New Jersey v. Jacobs, Civ. No. 93-3670 (WGB), 1994 U.S. Dist. LEXIS 15261, at *5 (Sept. 24, 1994). In fact, the New Jersey Appellate Division in Barbera v. DiMartino, 702 A.2d 1370 (N.J. App. Div. 1997), noted that New Jersey's Law Against Discrimination protects anyone who has been handicapped, even if

the handicap does not exist at the time of the discrimination. The Americans With Disabilities Act also protects individuals who have been rehabilitated. Collings v. Longview Fibre Company, 63 F.3d 828 (9th Cir. 1995), cert. denied, 516 U.S. 1048 (1996).

The Petitioner does not dispute the right of a state licensing agency to discipline its members, even if their conduct is a result of mental illness. However, to deprive an individual from reapplying for his or her license when healthy is discriminatory and in violation of the American With Disabilities Act. Federal Courts have insisted that employers or licensing agencies make an effort to provide the individual with reasonably accommodations. D'Amico v. City of New York, 132 F.3d 145 (2d Cir. 1998), cert. denied, 118 S.Ct. 2075 (U.S. 1998); Daoll v. Webb, 943 F. Supp. 1289 (D. Colo. 1998), injunction denied, 955 F.Supp 110 (D. Colo. 1997).

Recent case law has discussed the impact the Americans With Disabilities Act has on attorney discipline. The Americans With Disabilities Act does apply to the Court's discipline of attorneys. Ellen S. v. Florida Bd. of Bar Examiners, 859 F. Supp. 1489 (S.D. Fla. 1994). In In the Matter of John Wolfgram, 1995 W.L. 506002 (Cal. Bar Ct. 1995), the evidence showed that, due to a mental infirmity, the attorney should not be practicing law. The Petitioner claimed that he could not be placed on the inactive role because of the Americans With Disabilities Act. Id. The Court concluded that there was no reasonable accommodations that could be made to allow the Petitioner to practice law because of his substantial threat to his clients and to the public. Id. However, it was suggested that, after he was rehabilitated, he would be permitted to return to the practice of law. Id.

Where an attorney suffering from Attention Deficit Disorder engaged in dishonest conduct to the court and claimed that, because of his handicap, he could not be disciplined, the Oklahoma Supreme Court found that its discipline must take into account the Americans With Disabilities Act. Oklahoma Bar Assoc v. Busch, 919 P.2d 1114 (Okla. 1996). The Court ruled that the licensee's handicap was not responsible for his conduct and therefore discipline was warranted. Id. The attorney's disability was not a cause or contributing cause to his unethical conduct. Id. In the case at bar, the Petitioner's disability was the sole cause of

unethical conduct (taking partnership money).

Where an attorney misappropriated his client's money, and his bipolar manic depressive disease cause or contributed to his misappropriation of the funds, the Florida Supreme Court ruled that it must follow the Americans With Disabilities Act when deciding discipline. Florida Bar v. Clement, 662 So.2d 690 (Fla. 1995), cert. denied, 116 S. Ct. 1829 (1996). Because there was no other reasonable accommodation available to the Court to protect the public while the attorney was ill, the Court was forced to issue disbarment. Id. In Florida, however, a disbarred attorney can apply for reinstatement.

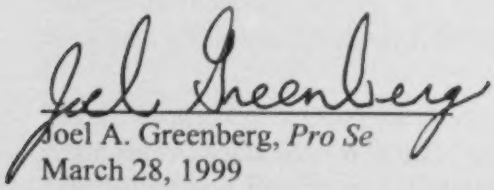
Although California, Oklahoma, and Florida have independently decided that attorney discipline must be in accord with the Americans With Disabilities Act, the Supreme Court of New Jersey, however, by it's reasoning and Order of Disbarment, has made it clear that it places no importance on the mandates of the Americans With Disabilities Act. It is extremely important that the United States Supreme Court grant this writ. The New Jersey Supreme Court must abide by Federal Legislation and follow mandates of the Americans With Disabilities Act in disciplining attorneys who are suffering or have suffered from a disability which is both recognized and protected by the Americans With Disabilities Act.

The New Jersey Supreme Court disregarded the mandates of the Americans With Disabilities Act, never considering the reasonable accommodations that could be made to protect the public, thereby permitting the now mentally healthy Petitioner to practice law.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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March 28, 1999